88-573

FILED
SEP 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

DOCKET NUMBER _____

HOWARD PHILLIPS,
Petitioner

VERSUS

TOTCO, A DIVISION OF BAKER
INTERNATIONAL CORPORATION, et al
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ARTHUR COBB
COBB & COBB
101 Attorneys Building
300 Louisiana Avenue
Baton Rouge, LA 70802-5803
387-2300 Area Code 504
Attorney for Howard Phillips

QUESTIONS PRESENTED

WAS PLAINTIFF DENIED EQUAL PROTECTION OF LAW BY THE UNITED STATES DISTRICT COURT (SITTING IN DIVERSITY) BECAUSE THE COURT FAILED TO APPLY LOUISIANA SUBSTANTIVE LAW?

WAS THE FIFTH CIRCUIT CLEARLY ERRONEOUS IN HOLDING THERE WAS NO "PLAIN ERROR", SO AS TO REVERSE THE JURY VERDICT BECAUSE OF AN INCORRECT JURY INTERROGATORY?

LIST OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

Howard Phillips, Plaintiff

Arthur Cobb, Attorney for Plaintiff

Totco, A Division of Baker International Corporation, Inc., Defendant

Employees National Insurance Company Defendant

Edward O. Taulbee, IV
Attorney for Totco
Post Office Box 3808
Lafayette, LA 70508

By Attorney for Plaintiff

ARTHUR COBB, Trial Attorney
COBB & COBB
101 Attorneys Building
300 Louisiana Avenue
Baton Rouge, LA 70802-5803
387-2300 Area Code 504

TABLE OF CONTENTS

PAGE NO.

Questions Presented i

List of Interested Parties ii

Lower Court Action 1

Jurisdictional Grounds In This Court 1

Federal Jurisdiction In Court of First Instance 1

Statement of the Case 1

Summary of Argument 2

Argument 3

Plain Error Rule 6

Conclusion 7

Certificate and Verification 9

Judgment from Trial Court 10

Jury Interrogatory in question 11

Judgment - 5th Cir. Ct. of Appeals 12

TABLE OF AUTHORITIES

PAGE NO.

Batesole v. Stratford, 505 F.2d 804 6

Bell v. Jet Wheel, 462 So.2d 166 2

Brown v. AVEMCO, 603 F.2d 1367 6

Colomb v. Texaco, 736 F.2d 218 7

Erie v. Tompkins, 58 S.Ct. 817 ..... 3, 4

Guaranty v. York, 65 S.Ct. 1464 4

Halphen v. Johns-Manfield,
484 So.2d 110 ..... 2, 4, 6, 7

Hunt v. Liberty, 720 F.2d 631 6

McEdward v. Northern, 595 So.2d 105 6

Miller v. Premier, 608 F.2d 973 6

Rodrigue v. Dixilyn, 620 F.2d 537 6

Weidersum v. National, 540 F.2d 62 6

Wright & Miller, Federal Practice
& Procedure, Civil §2558, p.672 6

LOWER COURT ACTION

The jury found defendant "not strictly liable to plaintiff".

JURISDICTIONAL GROUNDS IN THIS COURT

The Judgment of the Fifth Circuit is dated 10 August 1988. The time of entry is 10 August 1988. The Statutory Provisions granting jurisdiction in this Court are:

28 USC 2101(c); the Seventh Amendment; and Supreme Court Rule 17(1)(a).

FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

28 USC 1332(a)(1).

STATEMENT OF THE CASE

Howard Phillips was sent to conduct a standard pressure test on a blow-out preventer for his employer, Southland Rentals. He was to record the test with a **high** pressure Totco recorder. The Totco recorder was connected to the **high** pressure equipment by means of certain tubes and couplers. The couplers that connected the recorder to the **high** pressure equipment were to withstand pressures of up to 15,000 psi, as was the recorder. High and low pressure couplers are identical in design and can be easily interchanged on the Totco recorder.

On 6 November 1982, a **low** pressure coupler (manufactured to withstand a maximum pressure of only 6,500 psi) was connected to the Totco recorder without the knowledge of Mr. Phillips. As Mr. Phillips conducted the test, the Totco recorder exploded in his face, causing serious injury. The explosion was a result of the low pressure coupler (6,500 psi) being on the **high** pressure Totco recorder.

Mr. Phillips sued Totco in the United States Court for the Middle District of Louisiana under 28 USC 1332(a)(1) diversity jurisdiction. The trial judge allowed Mr. Phillips' fault to become an issue at trial, contrary to Louisiana law as expressly outlined in **Bell v. Jet-Wheel Blast, Inc.**, 462 So.2d 166 (La. 1985). The trial judge propounded a jury interrogatory that failed to reflect Louisiana product liability law expressly outlined in **Halphen v. Johns-Manfield, Inc.**, 484 So.2d 110 (La. 1986).

SUMMARY OF ARGUMENT

Plaintiff sued defendant under Louisiana products iability law in federal court under federal diversity jurisdiction. The jury held that defendant was not "strictly liable". This jury interrogtory in no way reflected Louisiana product liability law as set forth in **Halphen v. Johns-Manfield**, 484 So.2d 110

(La. 1986). The Fifth Circuit Court of Appeals affirmed the verdict.

The Fifth Circuit violated plaintiff's constitutional right to the "equal protection of the laws" by allowing the U.S. District Court to reach an outcome that would have been clearly the opposite in a Louisiana state court. Furthermore, the Fifth Circuit was clearly erroneous in finding that there was "plain error" which resulted in an incorrect verdict which created a substantial injustice.

ARGUMENT

Erie Railroad v. Tompkins, 58 S.Ct. 817, holds in pertinent part:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in nature or "general", be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Erie was further extended in **Guaranty v. York,** 65 S.Ct. 1464:

> Erie R. Co. v. Tompkins * * * expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, **the outcome of the litigation in the federal court should be substantially the same,** so far as legal rules determine the outcome of a litigation, **as it would be if tried in a State court.** The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result. At. p.1470.

Clearly, this outcome determination test was violated when the trial court propounded its interrogatory to the jury.

The interrogatory in question ask the extremely limited inquiry: "Was Totco strictly liable to the plaintiff?"

Louisiana products liability law was outlined and explained by the Louisiana Supreme Court in a certified opinion to the United States Fifth Circuit. **Halphen v. Johns-Manfield,** 755 F.2d 963 (5th Cir. 1985); 484 So.2d 110 (La. 1986). The court

listed several theories of recovery under products liability, none of which can be answered or decided with the single question "was defendant strictly liable?" This interrogatory effectively denied plaintiff a fair trial on the merits.

Plaintiff was prejudiced by the federal court's limited interrogatory and was denied equal protection of Louisiana law.

Louisiana products liability law has four categories: (1) unreasonably dangerous per se, (2) failure to warn, (3) there existed alternative designs; and (4) unreasonably dangerous because of a defect in design. Plaintiff presented evidence under each and every one of these theories. However, the jury was prohibited from determining where defendant was liable. The jury interrogatory did **not** ask whether the Totco recorder's utility outweighed its risk; whether there was a defect in its design when it left the manufacturer's control; whether there were safer alternative designs; or whether defendant failed to warn of a defect or relevant danger in the use of its product.

In a Louisiana court, the jury interrogatory must reflect the "law applicable to the cause submitted to them (the jury)". Louisiana Code of Civil Procedure Article 1792(B) (West 1988). Clearly, the outcome of this case would have been different in a Louisiana courts. Louisiana courts ask the questions as set forth in **Halphen v. Johns-Manfield,** 484 So.2d 110 when determining product liability.

PLAIN ERROR RULE

The Fifth Circuit refused to consider the above argument on the ground that Federal Rule 51 prevents any party from assigning error unless an objection is entered at the trial level. Plaintiff argues that the "plain error" rule clearly applies.

The Plain Error exception has been upheld and applied on numerous occasions. **McEdward v. Northern,** 595 So.2d 105 (2d Cir. 1979); **Weidersum Associates v. National Homes,** 540 F.2d 62 (2d Cir. 1976); **Miller v. Premier,** 608 F.2d 973 (4th Cir. 1979); **Rodrigue v. Dixilyn,** 620 F.2d 537 (5th Cir. 1980); **Brown v. AVEMCO,** 603 F.2d 1367 (9th Cir. 1979); **Batesole v. Stratford,** 505 F.2d 804 (6th Cir. 1974); **Hunt v. Liberty Libby,** 720 F.2d 631 (11th Cir. 1983); Wright & Miller, Federal Practice & Procedure, Civil §2558, p.672.

"Plain error is found if the deficient charge is likely responsible for an **incorrect verdict** which in itself crates a substantial injustice." **Colomb v. Texaco, Inc.**, 736 F.2d 218, at 222. "The plaintiff must establish that the instruction was an incorrect statement of law and that it was probably responsible for an incorrect verdict, leading to a substantial injustice." at p.222.

"Was Totco strictly liable to the plaintiff?" is an incorrect statement of Louisiana law as set forth in **Halphen v. Johns-Manfield**, 484 So.2d 110. Mr. Phillips was denied a fair trial and equal protection of the law because of this erroneous discrepancy between Louisiana law and the jury interrogatory. There is really no doubt that this error was responsible for an incorrect verdict which led to a substantial injustice.

CONCLUSION

Howard Phillips was greatly prejudiced by the interrogatory the trial court presented to the jury. He was denied a fair trial, a fair determination of his case based on the present Louisiana law, and he was denied equal protection under the law. The trial court was bound to apply Louisiana law as set forth in **Halphen**. Because the trial court failed to do this,

there is a patently obvious error of law which mandates a reversal of the Fifth Circuit and a new trial for Mr. Phillips.

Plaintiff prays that this Court grant certiorari and remand this case for a new trial on the merits without error.

Respectfully Submitted:

By Attorney for Plaintiff

ARTHUR COBB, Trial Attorney
COBB & COBB
101 Attorneys Building
300 Louisiana Avenue
Baton Rouge, LA 70802-5803
387-2300 Area Code 504

CERTIFICATE AND VERIFICATION

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared ARTHUR COBB, who, after first being duly sworn by me, did depose and say that the allegations of the Petition for Writ of Review and/or Certiorari are true and correct to the best of his knowledge, information and belief, and that three copies of the same has been mailed to Edward O. Taulbee on 9 September 1988.

_____

ARTHUR COBB

SWORN TO AND SUBSCRIBED before me on 9 September 1988.

_____

NOTARY PUBLIC

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

HOWARD W. PHILLIPS	*	CIVIL ACTION
	*	
VERSUS	*	
	*	
TOTCO, A DIVISION OF BAKER INTERNATIONAL CORPORATION, et al	*	NUMBER 85-704-B

JUDGMENT

For written reasons assigned:

IT IS ORDERED AND ADJUDGED that judgment shall be entered in favor of the defendant(s) and against the plaintiff(s) dismissing this suit with prejudice at plaintiff's cost.

Baton Rouge, Louisiana, June 22, 1987.

s/ Frank J. Polozola

U. S. DISTRICT JUDGE

(10:45 P.M. - JURY PRESENT)

THE COURT: HAS THE JURY REACHED A VERDICT?

THE FOREMAN: YES, SIR, WE HAVE.

THE COURT: OKAY, IF YOU WILL HAND IT TO THE MARSHAL, HE WILL BRING IT TO ME.

(VERDICT FORM HANDED TO THE COURT.)

THE COURT: THE CLERK WILL READ THE VERDICT.

CIVIL ACTION NUMBER 85-704-B, HOWARD PHILLIPS VERSUS TOTCO, A DIVISION OF BAKER INTERNATIONAL CORPORATION, ET AL, INTERROGATORIES TO THE JURY:

WAS TOTCO STRICTLY LIABLE TO THE PLAINTIFF? NO.

GERALD A. MYHAND, FOREMAN, 6/18/87.

THE COURT: IS THAT THE JURY'S VERDICT?

THE FOREMAN: YES, SIR.

THE COURT: DOES ANYONE WISH TO HAVE THE JURY POLLED?

ALL RIGHT.

MY CLERK IS GOING TO CALLL YOU AND ASK YOU IF THIS IS YOUR VERDICT, AND YOU WILL ANSWER YES OR NO.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-3486

HOWARD PHILLIPS, Plaintiff-Appellant

versus

TOTCO, A Division of Baker International Corporation, et al

Defendants-Appellees

Appeal from the United States District Court for the Middle District of Louisiana (CA-85-704-B)

(August 10, 1988)

Before KING, JOHNSON, and JOLLY, Circuit Judges.

PER CURIAM:*

The judgment on jury verdict for the defendant, TOTCO, dismissing plaintiff's product liability action against it, is affirmed.

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes

needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

On November 6, 1982, Howard Phillips sustained injuries while conducting high pressure tests on oil field equipment. Phillips alleged that his injuries occurred when a high pressure recorder, manufactured by TOTCO, malfunctioned. Phillps sued TOTCO in federal district court under a strict liability theory. The jury found for the defendants.

II.

On appeal, Phillips contends that the trial judge wrongly decided various evidentiary questions and submitted an incorrect interrogatory to thejury. He further challenges the failure of the jury to find TOTCO strictly liable.

A.

First, Phillips contends that the jury was not allowed to determine TOTCO's liability because of an incorrectly stated jury interrogatory. The interrogatory submitted to the jury stated: "Was TOTCO strictly liable to the plaintiff?" Phillips

asserts that the interrogatory does not accurately reflect Louisiana strict liability law.

We do not reach this question because the record indicates that Phillps has waived this issue on appeal. Fed. R. Civ. P. 49 allows a district court to submit special interrogatories to the jury in order that the jury may determine the potential liability of the defendant. The record reflects that all parties agreed to submit the jury interrogatory and that at no time did Phillips object to the jury instruction. As this court has stated in J.C. Motoro Lines v. Trailways Bus System, 689 F.2d 599, 602-03 (5th Cirl 1982), "[A] party who makes no objection to the omission of a special verdict question cannot object for the first time on appeal. . . By failing to object, the defendant denied the court below an opportunity to more precisely frame the issues involved. For that reason we have consistently held that a party who fails to object to the form of special interrogatories cannot complain for the first time on appeal."

B.

Phillips next contends that the jury erred in finding that TOTCO was not strictly liable for his alleged injuries. He maintains that the product was unreasonably dangerous as a matter of law.

The findings of the jury are evaluated by this court under a limited standard of review. This court will reverse a jury finding only where the evidence, viewed in its entirety and in the light most favorable to the jury's conclusion, indicates that reasonable men could not arrive at the same verdict as the jury. See Wiley v. Offshore Painting Contractors, Inc., 711 F.2d 601, 610-11 (5th Cir. 1983); Boeing v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969). Since TOTCO introduced evidence indicating that its recorder was not reasonably dangerous and that any injuries which Phillps incurred resulted from his negligence, we uphold the jury's findings.

C.

Phillps also contends that his negligence should not have been presented to the jury since his cause of action was premised on a strict liability theory.

This contention is untenable in the light of Bell v. Jet Wheel Blast, 462 So.2d 166, 171 (La. 1985). Bell clearly provides that such evidence can be admitted "[w]here the threat of a reduction in recovery will provide consumers with an incentive to use a product carefully, without exacting an inordinate sacrifice of other interests, comparative principles should be applied for the sake of accident prevention." Id. at 171. There are no grounds presented here that justify our questioning the district court's admission of this evidence of comparative negligence.

D.

Finally, Phillips contends that the trial court erred in disallowing certain evidence on the grounds of relevancy. Phillps sought to introduce evidence of unrelated equipment in an apparent attempt to attack the design of the TOTCO recorder. We hold that the district court's rejection of this unrelated evidence was well within the district court's discretion. See Nicholas v. Homelite Corp., 780 F.2d 1150, 1155 (5th Cir. 1986)

Having determined that Phillips' contentions have no merit, the jury's verdict and the judgment of the district court is

A F F I R M E D

Supreme Court, U.S.
FILED
NOV 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

DOCKET NUMBER 88-573
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM OF 1988

HOWARD PHILLIPS

VERSUS

TOTCO, A DIVISION OF BAKER
INTERNATIONAL CORPORATION, ET AL

ON APPEAL FROM THE UNITED STATE DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA, STATE OF
LOUISIANA
HONORABLE FRANK J. POLOZOLA, JUDGE PRESIDING

BRIEF IN OPPOSITION FOR RESPONDENT

EDWARD O. TAULBEE, IV
MARTIN, TAULBEE, ROWE, BARES & OLIVER
A PROFESSIONAL LAW CORPORATION
102 Versailles Blvd, Suite 708
P. O. Box 3808
Lafayette, Louisiana 70502
(318) 232-4744
ATTORNEY FOR TOTCO, A DIVISION OF BAKER

DOUGLAS W. TRUXILLO, ATTORNEY
P. O. Drawer 3507
Lafayette, LA 70502
(318)237-2660

43 pp

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby certifies that the following listed persons have an interest in the outcome of this case.

Howard Phillips, Plaintiff
Arthur Cobb, Attorney for Plaintiff
Phillip LeTard, Attorney for Plaintiff

Totco, A Division of Baker International Corporation and Aetna Casualty and Surety Company
Edward O. Taulbee, IV, Attorney for Totco and Aetna

South State Insurance Company
Frank Olivier, Attorney for South State Insurance Company (Intervenor)

Employers National Insurance Company, Defendant
Stephen W. Glusman and Donna Schwab, Attorneys for Defendant, Employers National Insurance Company

MARTIN, TAULBEE, ROWE, BARES&OLIVER
A PROFESSIONAL LAW CORPORATION
102 Versailles Blvd., Suite 708
P. O. Box 3808
Lafayette, LA 70502
(318) 232-4744

BY: EOT
EDWARD O. TAULBEE, IV

TABLE OF CONTENTS

	PAGE NO.
Certificate of Interested Persons.....	i
Table of Contents.....	ii
Table of Authorities.....	iii
Questions Presented.....	1
Statement of the Case.....	2
Summary of Argument.....	7
Argument.....	11
Conclusion.....	37
Certificate and Verification.....	39

TABLE OF AUTHORITIES

CASES **PAGE NO.**

Bell v. Jet Wheel Blast, A Division of Ervin Industries,
462 So. 2d 166 (La.1985).... 29, 30, 31

Byrd v. Hunt Tool Shipyards, Inc.
650 F 2d 44 (Fifth Cir. 1981)..... 34

Halphen v. Johns-Manville Sales Corp.
484 So. 2d 110 (La. 1986)... 23, 24

J. C. Motor Lines, Inc. v. Trailways Bus System,
689 F 2d 599 (Fifth Cir. 1982)..... 14, 15

Keyes v. Lauga,
635 F 2d 330 (Fifth Cir. 1981)..... 17, 18

Nimnicht v. Dick Evans, Inc.,
477 F 2d 133 (Fifth Cir. 1973)..... 15, 16

Thompson v. Tuggle,
486 So. 2d 144 (La. App. 3rd Cir. 1986)..... 31

Weber v. Fidelity and Casualty Insurance Company of NY
250 So. 2d 754 (La. 1971)... 21

Wiley v. Offshore Painting Contractors, Inc.
711 F 2d 602 (Fifth Cir. 1983)..... 35

STATUTES

Federal Rule Civil Procedure
49..... 12, 13

QUESTIONS PRESENTED

1. Did the Trial Judge commit manifest error in submitting special jury interrogatories dealing with the issue of strict liability, as set forth in accordance with Louisiana Law, thereby denying plaintiff equal protection of the Law?

2. Did the Trial Judge commit manifest error by allowing evidence of plaintiff's comparative negligence to be presented to the Jury in a strict products liability action?

3. Was the Jury's finding that the defendant, TOTCO, A DIVISION OF BAKER INTERNATIONAL CORPORATION, was not strictly liable unto plaintiff manifestly erroneous, such that it should be disturbed on appeal?

STATEMENT OF THE CASE

(A) COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.

MAY IT PLEASE THE COURT:

On or about July 27, 1985, plaintiff, Howard Phillips, perfected the present cause of action in the United States Court for the Middle District of Louisiana, seeking damages from several defendants, due to an accident that took place on or about November 6, 1982. Essentially, plaintiff was contending that, while working within the course and scope of his employment, he was caused to sustain severe and permanent injuries when a high pressure line allegedly failed, and struck plaintiff in the eye and head. Further, plaintiff perfected a State Court proceeding in the Fifteenth Judicial District Court, in and for the Parish of Lafayette, but this proceeding was stayed,

so that plaintiff's complaint in the United State Middle District could proceed to trial.

Trial in this matter was held before the Honorable Frank Polozola and a Civil Jury. After several days of testimony, and the presentation of evidence by all parties, the Jury found that the defendant, TOTCO, A Division of Baker International and its insurer, Aetna Casualty and Surety Company, were not liable unto plaintiff for any damages, an as a result of that ruling, plaintiff perfected an appeal, seeking relief from the United States Fifth Circuit Court of Appeals.

The facts surrounding that appeal are briefly summarized for the Court's review. On or about November 6, 1982, Howard Phillips, working for his employer, Southland Rentals, was allegedly caused to sustain severe and permanent injuries due to

an accident occurring on that date. While working for his employer, Howard Phillips was requested to perform certain testing procedures. These testing procedures were designed to test the ability of the oilfield equipment to maintain specific pressures before being sent into the field for actual operation. Pursuant to his employer's instructions, Howard Phillips began pressure testing certain equipment located at his employer's place of business, and in the process, was allegedly injured when a high pressure line became disconnected from the equipment, striking plaintiff in the eye and face.

During this testing procedure, it became necessary for Howard Phillips to employ a hydrograph recorder, (manufactured by Totco), which, essentially, is an instrument designed to record pressure generated by other equipment, but generates no pressure

in and of itself. Rather, the hydrograph recorder is designed only to measure, by means of a permanent record, the pressure generated by other equipment in a testing procedure, so that the consumers could be presented with a permanent and indelible copy of the testing procedures performed on the equipment which was later supplied to these individuals for use in the oilfield environment. It is undisputed that at the time of the accident made subject of this litigation, TOTCO, A Division of Baker International, had supplied a high pressure hydrograph recorder to Southland Rentals, so that a permanent record could be made of pressure generated by other equipment. During the course of testing the hydrograph recorder, one of the high pressure lines running from the hydrograph recorder to the source of the generated pressure became disengaged, and in the process, struck

plaintiff in the eye. (At all times pertinent herein, Aetna Casualty and Surety Company had issued a policy of liability insurance unto, and on behalf of, TOTCO, A Division of Baker International, and this policy was in full force and effect on the day of the alleged accident.)

The United States Court of Appeals for the Fifth Circuit, upon hearing plaintiff's appeal, affirmed the Judgment on Jury verdict for the defendent TOTCO, dismissing plaintiff's product liability action against it. As a result, plaintiff has subsequently filed a petition for certiorari with this Honorable Court.

SUMMARY OF ARGUMENT

Howard Phillips contends that the Trial Court committed manifest error when it presented a Jury interrogatory concerning the potential strict liability of the defendants, and this jury interrogatory was improperly framed, thus allowing prejudicial error to be committed by the Trial Court. It is respectfully submitted that plaintiff/appellant has no right to appeal from the alleged improper jury interrogatory, since plaintiff failed to timely object to the giving of the jury interrogatory, and as such, any right to so object has now been lost. Such was the finding of the United States Court of Appeals for the Fifth Circuit. However, should this Honorable Court find that plaintiff properly preserved his right to object to this jury interrogatory, it is respectfully contended that no manifest

error was committed by the giving of this jury interrogatory, and as such, the findings of the Jury are not to be disturbed on appeal.

Further, Howard Phillips contends that the Court committed manifest error when it allowed the issue of plaintiff's comparative negligence to be presented to the Jury throughout the trial proceedings. In support of this position, plaintiff contends that Louisiana Law does not allow the issue of comparative negligence to be presented in a strict products liability action, and as such, contends that the introduction of evidence concerning the comparative negligence of plaintiff was prejudicial, and amounted to manifest error. It is respectfully contended that plaintiff's assignment of error is wholly without merit, since the Courts of Louisiana have consistently held that it is within the

sound discretion of the Trial Court to allow testimony concerning the alleged comparative negligence of a plaintiff to be presented to the trier of fact in a strict products liability action, and as such, no manifest error was committed in the instant litigation. The sound discretion of the Trial Court has been exercised in such a manner as to prejudice neither party, and the submission of the plaintiff's comparative negligence to the trier of fact does not amount to prejudicial error to warrant reversal. This too is supported by the judgment of the United States Court of Appeals for the Fifth Circuit.

While Howard Phillips contends that the Jury was clearly erroneous in finding that the defendant, TOTCO, was not strictly liable unto plaintiff for his alleged injuries, it is respectfully submitted that such a factual finding by the trier of fact

is not subject to reversal by this Honorable Court, absent compelling evidence that manifest error was committed in the Court below, with prejudice resulting unto Howard Phillips. In the instant litigation, the trier of fact, having the opportunity to judge the facts, evidence, and credibility of all witnesses presented in this litigation, correctly interpreted the facts as presented to it, and applied the correct law, finding no liability on behalf of this defendant. Therefore, it is respectfully contended that the Trial Court's ruling was eminently correct.

ARGUMENT

QUESTION NUMBER 1:

Howard Phillips contends that the Trial Court committed manifest error when it submitted a special jury interrogatory concerning the potential strict liability of the defendant, TOTCO and, as a result, was denied equal protection of law because the court failed to apply Louisiana Substantive Law. Initially, it is respectfully contended that plaintiff has now waived his right to object to the alleged erroneous jury instruction, since no timely and contemporaneous objection was entered to the proposed jury instruction. This contention was the basis for the decision of the United States Court of Appeals for the Fifth Circuit. Failing to properly and timely object, this matter is not properly before this Honorable Court.

Essentially, plaintiff contends that the Honorable Frank Polozola committed manifest error in submitting a special jury interrogatory concerning the strict liability of the defendant TOTCO. This jury interrogatory, discussed between all counsel and the Court, requested the jury to enter a simple affirmative or negative response to the following question:

"Was TOTCO strictly liable to the plaintiff?"

While it is respectfully contended that plaintiff has no right to contest or object to this jury interrogatory at this stage of the proceedings, it is further contended that the jury interrogatory accurately reflects Louisiana law, and allows the jury to accurately access the potential liability of the defendant, TOTCO.

Federal Rule of Civil Procedure 49 specifically grants unto the District Courts

through the United States the power and ability to submit special verdict and interrogatories, so that a Jury can answer certain specified questions, to determine the potential liability of the defendant during litigation. In the instant litigation, a special interrogatory was submitted to the jury, concerning the potential strict liability of the defendant, TOTCO, unto the plaintiff. In pertinent part, Federal Rule of Civil Procedure 49 provides for the presentation of special verdicts and interrogatories to the jury, so that certain particular issues of fact may be categorically answered by the trier of fact, and a general verdict entered, based upon the answers to the jury interrogatories. It is a longstanding principal of American Jurisprudence that the failure of a party to timely object to the giving of a special interrogatory negates

the ability of the non-objecting party to raise this issue for the first time on appeal. In fact, it has long since been recognized that a proper and timely objection is necessary to preserve a litigant's right to contest the giving, or failure to give, certain special jury interrogatories, and in the instant litigation, the failure of plaintiff to timely object to the jury interrogatory renders meritless the present assignment of error.

In J. C. Motorlines, Inc. v. Trailways Bus Systems, 689 F 2d 599 (5th Cir. 1982), the Court, discussing the exact issue now raised in this appeal, remarked as follows:

> "Moreover, a party who makes no objection to the omission of a special verdict question can not object for the first time on appeal. (cites omitted)... By failing to object, defendant denied the Court below an opportunity to more precisely frame the issues involved. For that reason, we have consistently held that a party

> who fails to object to the form of special interrogatories can not complain for the first time on appeal." at pages 602 and 603.

Therefore, absent a contemporaneous and timely objection to the special jury interrogatory which now forms this assignment of error, plaintiff has no right to contest this jury interrogatory for the first time on appeal. Finding no contemporaneous and timely objection, it is respectfully contended that the present assignment of error has no merit, and the jury interrogatory, and the jury findings reflecting the submitted interrogatory, are to be upheld on appeal.

In Nimnicht v. Dick Evans, Inc., 477 F 2d 133 (5th Cir. 1973), the United States Court of Appeals for the Fifth Circuit again expressed the longstanding jurisprudential pronouncement that a party waives his right to object to a special jury interrogatory

when no timely objection is made to the interrogatory during the trial proceedings. The Court noted:

> "There was no objection to the form of the interrogatories as propounded to the Jury. It, therefore, is too late to complain on appeal." at page 134. (emphasis supplied).

Therefore, defendant, TOTCO, respectfully requests this Honorable Court to support the decision of the United States Court of Appeals for the Fifth Circuit and to find plaintiff's initial assignment of error to be without merit, since plaintiff failed to timely preserve this issue for appellate review. Failing to so object, this matter can not be considered by this Honorable Court for the first time on appeal.

Assuming, arguendo, that this Honorable Court finds that plaintiff somehow timely preserved his right to question the jury interrogatory which forms the central core of this assignment of error, it is

respectfully contended that the Jury interrogatory accurately reflects the present state of Louisiana law, and is within the sound discretion of the Trial Judge in framing the jury interrogatory. Countless cases throughout Louisiana and the United States have plainly noted that the framing of a special jury interrogatory is within the discretion of the Trial Court, and special interrogatories are unassailable if they accurately and adequately present the issues to the jury, and are found to be within the considerable discretion afforded unto the District Courts throughout the United States of America. In Keys v. Lauga, 635 F 2d 330 (5th Cir. 1981), the Court observed as follows:

> "The defendant's objections both to the Judges instructions and to the special interrogatories are more to their form than to their content. The Trial Judge has considerable latitude in framing his instructions to the jury as long as he explains adequately

> all of the claims and theories advanced by both parties. (cites omitted). Similarly, special interrogatories are unassailable if they adequately present the issues to the Jury." at page 333.

Therefore, prior to a determination that manifest error has been committed in the District Court below, it becomes incumbent upon Howard Phillips to prove that the special jury interrogatory was erroneous. No such proof can be forthcoming in the instant litigation.

Howard Phillips contends that the framed jury interrogatory somehow does not present an accurate representation of Louisiana law, insofar as Louisiana law has defined strict products liability. It is respectfully contended that the jury interrogatory accurately reflects Louisiana law, in that it requests a special finding by the trier of fact concerning the strict liability of the defendant, TOTCO, unto plaintiff. It is

an elementary principal of law that a jury interrogatory need not contain numerous parts and sub-parts leading to the ultimate conclusion, but rather, these sub-parts are more accurately gleaned from the Judge's charge to the jury, wherein strict products liability was accurately defined to the trier of fact. The Honorable Frank Polozola prepared specific, detailed, and comprehensive instructions concerning the present state of Louisiana's strict products liability law, and these instructions were adequately and completely conveyed to the trier of fact. Therefore, the Judge's jury charge, accurately reflecting the present state of Louisiana's strict products liability law, encompasses the interrogatory presented to the Jury, and as such, it is respectfully contended that the trier of fact was completely able to render a finding of strict products liability, but the

evidence and testimony simply did not warrant such a finding. It is an elementary principal of law that a jury interrogatory can not be exhaustive, containing a numerous parts and subparts, since to do so would amount to confusion and to complexity, where simplicity must be the rule. In the instant litigation, the jury interrogatory now complained of by Howard Phillips accurately and succinctly presents the jury with an opportunity to find the Defendant, TOTCO, strictly liable, based upon the evidence and facts presented, and the law as accurately expressed to the trier of fact. Therefore, it is a logical progression for the jury to consider the ultimate issue of fact, premised upon the necessary factual findings that lead up to the ultimate factual determination. In the instant litigation, the jury interrogatory of which plaintiff now complains centers around the ultimate

questions presented in this litigation: namely, whether the defendant Totco was strictly liable. There need not be a separate and distinguishable jury interrogatory setting forth each and every element of strict products liability, since such elements are necessarily an essential part of the ultimate finding of strict liability. Therefore, it is respectfully contended that the jury interrogatory, framed by the Honorable Frank Polozola, was eminently correct.

Strict products liability in Louisiana, originating with Weber v. Fidelity and Casualty Insurance Company of NY, 250 So. 2d 754 (La. 1971) renders a manufacturer or an entity clothed with a manufacturer's veil strictly liable unto an injured consumer or third party, provided that certain essential elements have been proven by plaintiff. Strict products liability, of course,

relieves plaintiff from proving the actual knowledge possessed by the defendant manufacturer, but still requires certain elements of proof, prior to a finding of strict products liability. In the instant litigation, it becomes necessary to focus on whether or not, under any facts or evidence presented at trial, the defendant Totco could be held strictly liable unto plaintiff. Necessarily, this involved a several step process, whereby plaintiff must prove, among other things, that the product presented an unreasonable risk of harm, this risk of harm caused damage to Howard Phillips, and resultant damages occurred as a result of the product defect. There is no statutory or jurisprudential requirement that a trier of fact make specific, categorical findings, prior to finding a defendant strictly liable. In fact, a finding of strict products liability

necessarily requires that certain elements be proven by plaintiff, and the ultimate issue presented to the trier of fact concerns not the theoretical bases for strict products liability, but rather, whether or not a defendant is strictly liable. In the instant litigation, a failure to find the defendant strictly liable unto plaintiff did not result from the jury interrogatory presented, but rather, was the result of the failure of plaintiff to carry the necessary burden of proof. The objection to the jury interrogatory is misplaced.

In Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110 (La. 1986), the Louisiana Supreme Court accurately and definitively defined strict products liability, noting several separate theories and causes of action under strict products liability. The Court plainly recognized a manufacturer's

duty to warn, a duty to correctly manufacture, and to manufacture a product that is not unreasonably dangerous to the ultimate consumer. There need not be a finding under all, or any, of the separate bases of liability, before an ultimate determination can be made as to the potential strict liability of a manufacturer defendant. The Halphen, supra, Court plainly recognized that a plaintiff is allowed to proceed under several potential theories of strict products liability, and if sufficient evidence is presented to sustain one of the theories of liability, the defendant is strictly liable unto plaintiff. In the instant litigation, Howard Phillips complains that the jury was improperly instructed, in that the jury was only given a single interrogatory concerning the potential strict liability of the defendant. It is respectfully contended

that such a single interrogatory accurately reflects the ultimate issue before the trier of fact, and there need not be separate theories of liability expounded on the jury interrogatories. It is necessary for a plaintiff, such as Howard Phillips, to prove that a product presents an unreasonable risk of harm, and if such proof is forthcoming, the defendant is strictly liable. In the instant litigation, the alleged failure to give sub-parts to the jury interrogatory does not render the jury's finding erroneous, but rather, this reflects the jury's finding, based upon the law and evidence, that the defendant Totco was not strictly liable based upon the proof presented at trial. Plaintiff would have this Honorable Court reverse the decision rendered in this matter, believing the jury interrogatory to be incorrectly framed. It is respectfully contended that the jury

interrogatory is correct, and presents an accurate statement of Louisiana strict products liability law.

Howard Phillips proposed a four pronged jury interrogatory, which should have been submitted in place of the single and clear interrogatory which was presented to the trier of fact. However, plaintiff fails to note that the proposed jury interrogatory merely reflects alternative theories of liability, and does not change the overall finding made by the trier of fact. The jurisprudence interpreting Louisiana strict products liability law has consistently held that a plaintiff may proceed under any theory of strict products liability, such as failure to warn or failure to properly design, but a final determination involves only a determination as to whether or not the defendant was strictly liable. It is respectfully contended that plaintiff

requested a four prong jury interrogatory which would serve no useful purpose, and would not alter the fact that plaintiff has utterly failed to carry the necessary burden of proof at trial, and as such, judgment was properly rendered in favor of the defendant, Totco. Therefore, Totco, A Division of Baker International and Aetna Casualty and Surety Company respectfully requests this Honorable Court to deny Howard Phillips' petition for certiorari, finding this assignment of error to be without merit.

QUESTION NUMBER 2:

Howard Phillips contends that his comparative negligence, under no circumstances, should have been presented to the trier of fact, since his cause of action was premised on Louisiana strict products liability law. Further, plaintiff argues that comparative negligence has been strictly disallowed in strict products

liability actions, and as such, the facts concerning the comparative negligence of plaintiff were not properly before the Court. It is respectfully submitted that countless cases have recognized that a valid and supportable defense to a strict products liability action is the comparative negligence of the plaintiff, and in the instant litigation, it is contended that the Trial Court was well within its sound discretion by allowing evidence of plaintiff's comparative negligence to be presented to the jury. The law of Louisiana is very clear that it rests within the sound discretion of the Trial Court in determining whether or not plaintiff's comparative negligence will be allowed during the trial proceedings, and absent manifest error, this is not to be disturbed on appeal. In the instant litigation, the Trial Court's ruling that plaintiff's comparative negligence

could be presented to the trier of fact was not in error.

In Bell v. Jet Wheel Blast, A Division of Ervin Industries, 462 So. 2d 166 (La. 1985) the Court set forth the appropriate guidelines for determining whether or not an individual's comparative negligence should serve to diminish or defeat recovery in a strict products liability action. The Court in Bell, supra, held as follows:

> "We are called upon to decide whether contributory negligence or comparative fault applies in strict products liability cases... After considering the oral and written arguments of the parties, we hold that contributory negligence does not apply in strict products liability cases, and that the principal of comparative fault may be applied in some products cases according to precepts formulated by analogy from the principal of C.C. Article 2323 and former Article 2323, and other relevant social values, ethical principals and empirical data.
>
> On the other hand, comparative fault principals would seem to coincide with and further the goals of products liability doctrine in some cases. Where the threat of a reduction in

> recovery will provide consumers with an incentive to use a product carefully, without exacting an inordinate sacrifice of other interests, comparative principals should be applied for the sake of accident prevention." at pages 167 and 171.

Therefore, the Court in Bell, supra squarely recognized that the comparative negligence of the injured plaintiff was properly at issue in a strict products liability action, under certain circumstances. It is within the sound discretion of the Trial Court to allow the issue of plaintiff's comparative negligence to be presented to the trier of fact. The rational in Bell, supra, highlights this principal of law:

> "Pending further judicial or legislative developments, we are content to assume the position taken by the California Court which scrupulously abstained from issuing a detailed guidebook to the new area of comparative negligence, preferring to adopt the view 'that...the Trial Judge of this State are capable of applying (a) comparative negligence rule without our setting guidelines in anticipation of expected problems.

> The problems are more appropriately resolved at the Trial level in a practical manner instead of a theoretical solution at appellate level. The Trial Judges are granted broad discretion in adopting such procedures as may accomplish the objectives and purposes expressed in this option'". as page 172.

Therefore, it has long been held that it is within the sound discretion of the Trial Courts to allow plaintiff's comparative negligence to be interposed into a strict products liability action. Surely, the trier of fact must be allowed to hear such action. Surely, the trier of fact must be allowed to hear such evidence, in a case such as that presented in the instant litigation.

In Thompson v. Tuggle, 486 So. 144 (La. App. 3rd Cir., 1986), the Court, discussing under what circumstances a plaintiff's comparative negligence should be at issue in a strict products liability action, observed that a plaintiff's recovery should be

reduced in a products liability case on a case by case basis. Therefore, in the instant litigation, it can not be said that the Trial Court committed manifest error in allowing the plaintiff's comparative negligence to go to the trier of fact, when such an issue is properly decided on a case by case basis, determined upon the evidence and facts presented throughout the trial proceedings. In the instant litigation, ample testimony was presented at trial to affirmatively show that Howard Phillips possessed the requisite skill and knowledge to work with high pressure equipment, but yet, failed to act as a reasonable and prudent person under the circumstances presented. Further, the Court was presented with testimony that employees of Southland Rentals were well trained and equipped to deal with high pressure, and had been instructed, on numerous occasions, to

determine the maximum pressure rating of the system that was to be tested, prior to energizing the system with pressure. Therefore, based upon the facts and evidence presented at trial, it surely can not be said that the Trial Court abused its discretion in allowing plaintiff's comparative negligence to be presented to the jury. The issue of a litigant's comparative negligence is a matter within the sound discretion of the Trial Court, and absent a gross abuse of this discretion, no relief can be forthcoming on appeal.

QUESTION NUMBER: 3

Howard Phillips further contends that the jury was manifestly erroneous in finding that the defendant, Totco, was not strictly liable unto him for his alleged injuries and that the United States Court of Appeals for the Fifth Circuit committed error in finding that there was no "plain error", so as to

reverse the jury verdict. It is respectfully contended that the jury's finding, predicated upon a review of the evidence and testimony presented to it, must not be disturbed on appeal, absent a showing of manifest error. Due deference is required to the findings of the trier of fact, who was in the best position to review the evidence, facts and credibility of all witnesses, and as such, this finding should not be disturbed on appeal by this Honorable Court.

In Byrd v. Hunt Tool Shipyard, Inc., 650 F 2d 44 (5th Cir. 1981), the Court set forth the following standard was recognized which is to be used by an appellate tribunal, in reviewing decision of a lower Court:

> "When reviewing jury verdicts, The Court must give deference to the jury's findings. Reversible error appears only when there is an insufficient evidentiary basis to support the verdict." at page 48.

Similarly, in Wiley v. Offshore Painting Contractors, Inc., 711 F 2d 602 (5th Cir., 1983), the Court held as follows:

> "The findings of the Trial Court can be disturbed only if they are 'clearly erroneous' under a review of all of the evidence. (cites omitted). And, the findings of the jury can be set aside only if, 'viewing the evidence as a whole and in the light most favorable to the (opposing) party,' reasonable men could not arrive at the verdict that Cheveron's negligence was the sole cause of the exposure." at page 610.

Therefore, the United States Court of Appeals for the Fifth Circuit, paralleling the manifestly erroneous standard that has evolved in the Courts throughout the State of Louisiana, has consistently noted that a jury's finding will not be disturbed on appeal, absent a showing of manifest error. In the instant litigation, no such showing was made by Howard Phillips, and, as a result, the United States Court of Appeals

for the Fifth Circuit left undisturbed the Trial Court's findings.

The Court and the trier of fact were presented with ample and sufficient testimony to support a finding of non-liability on the part of this defendant, and as such, the jury's finding must not be disturbed on appeal. Plaintiff has simply failed to prove that the jury was manifestly erroneous in its determination that the product manufactured by Totco, was not unreasonably dangerous. The law and evidence simply do not support a reversal of the jury's conclusion.

CONCLUSION

TOTCO, A Division of Baker International and Aetna Casualty and Surety Company respectfully requests this Honorable court to deny plaintiff's petition for certiorari from the decisions of the United States Middle District Court, as well as the United States Court of Appeals for the Fifth Circuit, since plaintiff has failed to show manifest error in the jury's finding. The Trial Court, graced with the opportunity to review the facts, evidence, and the overall appearance and credibility of all witnesses and litigants to this proceeding, stands in the best position to render a fair and impartial verdict, same having been rendered under all circumstances presented to the Court. Plaintiff can not now stand before this Honorable Court and contend that the jury was manifestly erroneous in finding Totco, A Division of Baker International,

not strictly liable,when plaintiff simply failed to carry the necessary burden of proof to show the strict liability of the defendant manufacturer. Failing to produce the necessary proof, plaintiff's complaint for damages was properly rejected, and the plaintiff's petition for certiorari must be denied.

CERTIFICATE AND VERIFICATION

STATE OF LOUISIANA

PARISH OF LAFAYETTE

BEFORE ME, the undersigned authority, personally came and appeared EDWARD O. TAULBEE, IV, who, after being duly sworn by me, did depose and say that the allegations of the Brief in Opposition for Respondent are true and correct to the best of his knowledge, information and belief, and that three (3) copies of the same has been mailed to Arthur Cobb on 2 November, 1988.

EDWARD O. TAULBEE, IV

SWORN TO AND SUBSCRIBED before me on 2 November, 1988.

NOTARY PUBLIC